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No. 84-362 (3)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

GLASS PACKAGING INSTITUTE, *et al.*,

Petitioners

v.

DONALD T. REGAN, *et al.*,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SOCIETY OF THE PLASTICS INDUSTRY, INC. IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether standing to obtain judicial review of an administrative agency's action may properly be denied to parties who assert interests they have conceded are not even arguably within the zone of interests protected by the statute pursuant to which the agency acted?

2. Whether this case presents any premise for the theory that the zone of interests standing test established by this Court requires clarification or abandonment?

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BRIEF FOR THE SOCIETY OF THE PLASTICS INDUSTRY, INC.[1] IN OPPOSITION

STATEMENT OF THE CASE

This lawsuit, precipitated by the Bureau of Alcohol, Tobacco and Firearms' ("BATF") clearance of polyethylene terephthalate ("PET") as a material suitable for use in containers for distilled spirits, is simply the latest phase of an economic battle between the glass industry and the plastics industry. *See* App. at A-13, A-15, A-23, and A-29.[2]

Petitioners first challenged the clearance of PET liquor bottles in the United States District Court for the District of

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[1] In accordance with Rule 28.1 of the Rules of the Supreme Court, The Society of the Plastics Industry, Inc. states that it is a corporation with no parent companies, subsidiaries, or affiliates.

[2] "Pet." refers to the Petition for Certiorari. "App." refers to the Appendix to the Petition for Certiorari.

Columbia on three procedural and environmental grounds, none of which was found to have merit (App. at A-24-32), and two of which have been abandoned by the Petitioners during the appellate process. Pet. at 4 n.1; App. at A-7. The District Court's decision was appealed to the United States Court of Appeals for the District of Columbia Circuit where, during oral argument, the Court of Appeals *sua sponte* raised the issue of Petitioners' standing to obtain review of BATF's decision not to hold a notice and comment rule making proceeding prior to clearing PET liquor bottles. In response, Petitioners filed a brief arguing that their asserted interest, the right to market distilled beverage containers free of competition from containers approved in an allegedly illegal fashion, was within the zone of interests regulated by the relevant statute, Section 5301(a) of the Internal Revenue Code, 26 U.S.C. § 5301(a) (1976 and Supp. V 1981). *See* App. at A-10-11. The Court of Appeals concluded that Section 5301(a) was not intended to regulate competition among manufacturers of liquor bottles but, instead, was solely concerned with protection of the revenue. App. at A-14. Therefore, the Court of Appeals held that the Petitioners' "injury is not arguably within the zone of interests, as required by the Supreme Court." App. at A-15. The Court of Appeals did find that Petitioners had standing under the zone of interests test with respect to their claim under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq*. (1976), although it determined this claim to be without merit. App. at A-16 n.38, A-22-23.

ARGUMENT

A. Introduction

The primary question before this Court is whether standing to obtain judicial review of an administrative agency's action may properly be denied to parties who assert interests conceded to be outside the zone of interests protected by the agency's statutory mandate. Petitioners no longer explicitly argue that they are within the zone of interests regulated by Section 5301(a).[3] Rather, they allege that failure to meet the

[3] While avoiding an explicit claim that their alleged competitive injury is arguably within the zone regulated by Section 5301(a) in apparent

zone test, by itself, is an insufficient basis for denying standing or, in the alternative, that the test should be clarified or overruled. Pet. at 7, 17.

The Society of the Plastics Industry, Inc. ("SPI") respectfully submits that the Petitioners have not shown any reason sufficient for this Court to review the decision of the Court of Appeals. The Court of Appeals correctly applied the zone of interests test established by this Court in *Association of Data Processing Service Organizations, Inc.* v. *Camp* (*Data Processing*), 397 U.S. 150, 153 (1970), and repeatedly reaffirmed by this Court. It reached the unassailable conclusion that Petitioners did not have standing to obtain review of BATF's action since Petitioners' alleged competitive injury was not even arguably within the zone of interests regulated by the revenue protection statute, Section 5301(a).

This case demonstrates why standing should be denied when a party does not meet the zone of interests test. Since the only remaining interest alleged by the Petitioners is the avoidance of competitive injury, they would have nothing relevant left to raise during any subsequent administrative proceeding.[4]

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recognition of the weakness of that position, Petitioners attempt to make the same point by implication in arguing that the application of the zone test by the Court of Appeals conflicts with this Court's application of the test in *Association of Data Processing Service Organizations, Inc.* v. *Camp* (*Data Processing*), 397 U.S. 150 (1970). *See* Pet. at 10-11. The absence of any conflict between this Court's application of the zone of interests test in *Data Processing* and the Court of Appeals' decision in this case is demonstrated in a subsequent section of this Brief (at 7-8). In any case, SPI respectfully submits that the Petitioners have admitted, by their omission of any explicit statement to the contrary, that their asserted competitive interest does not arguably fall within the zone protected by Section 5301(a).

[4] The District Court found that BATF's action in clearing PET liquor bottles was interpretive and that a notice and comment rule making proceeding was not required. App. at A-28-29. Since the Court of Appeals found that Petitioners lacked standing to challenge the procedure followed by BATF, it did not reach the question of whether a notice and comment rule making was required. *See* App. at A-8, A-15. Even if this Court were to accord Petitioners standing, a subsequent administrative proceeding would not be necessary unless the Court of Appeals were to reverse the District Court's decision on the merits.

Such a proceeding would be held to determine one issue, whether PET liquor bottles adequately protect the revenue, and Petitioners have already conceded this point. App. at A-7, A-23. If parties devoid of protected interests, such as Petitioners, are accorded standing, the result will be unwarranted and fruitless judicial intervention into administrative agencies' performance of their statutory mandates on behalf of parties who have no interest to advance, and no contribution to make, which is relevant to those mandates. Such a result would conflict with the policy underlying the zone of interests test — the recognition and preservation of the proper separation of powers integral to our system of government.

B. The Court of Appeals Properly Applied the Zone of Interests Test In Accordance With the Decisions of this Court

In *Data Processing* and its progeny,[5] the Court has indicated that, in addition to establishing injury in fact, the constitutional minimum for standing under Article III of the Constitution, a party seeking review of agency action must meet three prudential standing considerations:

1) " 'The plaintiff generally must assert his own legal rights and interests, and cannot rest his claim on the legal rights or interests of third parties . . . .' " *Valley Forge Christian College* v. *Americans United for Separation of Church and State* (*Valley Forge*), 454 U.S. 464, 474 (1982) (quoting *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975)).

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[5] *Allen* v. *Wright*, 468 U.S. _____, 104 S. Ct. 3315, 3325 (1984); *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464, 474-475 (1982); *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 n.6 (1979); *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 320-21 n.3 (1977); *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 39 n.19 (1976); *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 227 n.16 (1974); *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686 n.13 (1973); *Sierra Club* v. *Morton*, 405 U.S. 727, 733 & n.5 (1972); *Investment Company Institute* v. *Camp*, 401 U.S. 617, 620 (1971); *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45, 46 (1970); *Barlow* v. *Collins*, 397 U.S. 159 (1970).

2) The Court will refrain from adjudicating "'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches." *Id.* at 475 (quoting *Warth* v. *Seldin*, 422 U.S. at 499-500).

3) The plaintiff's complaint must fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Id.* (quoting *Data Processing*, 397 U.S. at 153).

1. Petitioners Must Meet the Prudential As Well As the Constitutional Requirements for Standing

Petitioners contend that the prudential factors are not to be applied in all cases as a matter of course, quoting out of context language from three decisions of this Court. Pet. at 8. This Court, however, has identified only two circumstances in which courts may refrain from applying the prudential considerations. *See Warth* v. *Seldin*, 422 U.S. at 509. "Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one 'who otherwise would be barred by prudential standing rules.'" *Gladstone, Realtors* v. *Village of Bellwood* (*Gladstone*), 441 U.S. 91, 100 (1979) (quoting *Warth* v. *Seldin*, 422 U.S. at 501). In addition, in constitutional cases, particularly those involving the First Amendment, this Court has allowed plaintiffs to bring causes of action on behalf of third parties where the parties whose rights the plaintiffs are asserting would be precluded from challenging a law *Warth* v. *Seldin*, 422 U.S. at 510; *Eisenstadt* v. *Baird*, 405 U.S. 438, 444-446, 445 n.5 (1972).

Placed in the context of the cases from which it is derived, the language of this Court quoted by Petitioners (Pet. at 8) does not endow courts with discretion to accord standing to a party who fails to meet the prudential tests. In *Valley Forge*, the Court stated that the Article III standing requirement of injury in fact "states a limitation on judicial power, not merely a factor to be balanced in the weighing of so-called 'prudential' considerations." 454 U.S. at 475. The Court was not suggesting that application of the prudential tests is optional, but, instead, that fulfillment of the prudential standards does not confer constitutional

standing. *Id.* In *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.* (*Duke Power*), 438 U.S. 59 (1978), the Court indicated only that the prudential third-party standing limitation should not be applied "to all cases as a matter of course," specifically not in cases "[w]here a party champions his own rights." 438 U.S. at 80. The statement in the footnote in the *Gladstone* case that "[t]here are other nonconstitutional limitations on standing to be applied in appropriate circumstances," 441 U.S. at 100 n.6, constitutes the Court's recognition that the zone of interests test is a third prudential standing test, in addition to the limitations relating to generalized grievances and the rights of third parties. 441 U.S. at 100 and 100 n.6. The eminently logical proposition suggested in *Gladstone* and in *Duke Power* that not every case will have facts implicating all of the prudential standing tests is not a sufficient predicate for the conclusion that this Court has authorized standing where a party admittedly does not meet one of the tests, a holding for which Petitioners are unable to cite a single decision of this Court.

2. The Court of Appeals Properly Applied the Zone of Interests Test

Petitioners maintain that the Court of Appeals' decision conflicts with *Data Processing* and its progeny on two grounds: (1) "the Court of Appeals utilized the zone of interests test, adopted by this Court to relax prudential restraints on standing to protest administrative action, in a manner which significantly curtails access to the courts for persons aggrieved by the unlawful action of a federal agency;" and (2) "by requiring Petitioners to demonstrate that the interest they asserted was intended to be regulated or protected by § 5301(a), the court below in effect revived the 'legal interest test' which the Supreme Court rejected as a test for standing." Pet. at 9. These contentions are without merit.

Petitioners have made no showing that the Court of Appeals' decision curtails judicial review by any persons other than those who, like Petitioners, assert no interest so much as arguably within the zone regulated by the relevant statute. The zone of interests test articulated by this Court in *Data Processing*, and repeatedly reaffirmed in subsequent decisions (*see*

cases collected at note 5, *supra*), is intended to deny standing to such persons. *See, e.g., Valley Forge*, 454 U.S. at 475; *Gladstone*, 441 U.S. at 99-100 and 100 n.6. The contention that the Court of Appeals' decision will render many administrative decisions unreviewable is belied by the fact that the Court of Appeals accorded Petitioners standing on their moribund environmental claim. App. at A-16 n. 38.

Petitioners are correct in stating that *Data Processing* expanded the class of persons entitled to standing by replacing the legal interest test with the zone of interests test. 397 U.S. at 153-154. *Data Processing*, however, did not enunciate a rule of universal standing, immune from any prudential considerations. To the contrary, the Court in *Data Processing* evolved the zone of interests test (replacing the more restrictive legal interest test) *in addition to* the tests required by Article III of the Constitution. 397 U.S. at 153. *See* cases collected at note 5, *supra*. The Court simply enlarged the class of litigants by extending standing to parties whose interests are *arguably* within the protected *zone*, rather than only parties whose interests *are protected. See Data Processing*, 397 U.S. at 154. Since Petitioners are not even arguably within the relevant zone, they have no grounds for disagreement with the application of the zone test by the Court of Appeals.

Nor did the Court of Appeals' decision in this case revive the legal interest test. That test determined standing according to whether the plaintiff had an enforceable legal right based on an in-depth review on the merits. *See Id.* at 153, citing *Tennessee Electric Power Co.* v. *TVA*, 306 U.S. 118, 137-138 (1939). Far from applying the legal interest test superseded by this Court in *Data Processing*, the Court of Appeals conducted the appropriate zone of interests inquiry: "[The zone of interests] test 'requires some indicia — however slight — that the litigant before the court was intended to be protected, benefitted or regulated by the statute under which suit is brought.'" App. at A-10 (quoting *Copper & Brass Fabricators Council, Inc.* v. *Department of the Treasury*, 679 F.2d 951, 952 (D.C. Cir. 1982)). The Court of Appeals correctly concluded from the face of the relevant statute, Section 5301(a) of the Internal

Revenue Code, that Congress did not intend to protect or regulate competitive interests. App. at A-11.

Petitioners also contend that, if the Court of Appeals' analysis had been applied to the *Data Processing* facts, the Court of Appeals would not have arrived at the same conclusion as did this Court. Pet. at 10. Although unstated, the suggestion Petitioners seek to convey by this argument is that their asserted competitive interest falls within the zone regulated by Section 5301(a). SPI respectfully submits that the suggestion remains unstated by Petitioners because there is not a scintilla of evidence that Section 5301(a) was intended to regulate competition among liquor bottle manufacturers. *See* App. at A-11-15.

Petitioners assume that the Court of Appeals would have interpreted the statute at issue in *Data Processing*, Section 4 of the Bank Service Corporation Act of 1962, 12 U.S.C. § 1864 (1976) (amended 1982), as only regulating competition among banks because that is Petitioner's view of the statute's legislative history. This Court, however, did not share Petitioners' assessment of the legislative history. The Court found that Section 4 was aimed at preventing banks from engaging in a nonbanking activity, arguably bringing nonbank data processing competitors of banks within the zone of interests regulated by the statute. *Data Processing*, 397 U.S. at 155-156. By contrast, the Court of Appeals in this case found that "the statute authorizing agency action indicates a congressional interest to regulate only a specific narrow governmental interest — protection of tax revenues" (App. at A-14), a conclusion Petitioners do not contest. *See* Pet. at 10 n.9. The *Data Processing* facts are thus completely distinguishable from the facts of this case where there is no arguable intention to regulate competition by the relevant statute. App. at A-11.

3. Denial of Standing Based On the Zone of Interests Test Is In Accordance With the Decisions of this Court and the APA

Petitioners argue that standing cannot be denied on the basis of the zone of interests test alone because the Supreme Court has never done so. Pet. at 11. Whether the Court, through

the happenstance of the facts before it, has denied standing under the test is irrelevant; what is relevant is that the Court has consistently maintained that the test is required to be satisfied. *See* cases collected at note 5, *supra*.

Petitioners assert that the Court has found standing without applying the zone test when such application "arguably would have yielded a different result." Pet. at 11. The cases Petitioners cite in support of this position are inapposite.[6]

The Petitioners urge this Court to hold that, unless there are compelling circumstances precluding judicial review, a court may not deny standing based on the zone test where a party has standing under Article III. Pet. at 11-12. This position runs afoul of this Court's statements that the prudential standing tests must be met in addition to the constitutional tests. As the Court stated in *Gladstone*:

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[6] In *Bryant* v. *Yellen*, 447 U.S. 352 (1980), the zone test was applied by the Court of Appeals, and standing was found. *United States* v. *Imperial Irrigation District*, 559 F.2d 509, 523 (9th Cir. 1977), *modified*, 595 F.2d 524 (9th Cir. 1979), *rev'd in part and vacated in part on other grounds sub nom. Bryant* v. *Yellen*, 447 U.S. 352 (1980). The fact that the zone test was not mentioned by the Supreme Court in agreeing with the lower court's decision on standing is not significant because of the full consideration of the issue by the court below and because the Supreme Court only gave a cursory review of the standing decision in its ruling, focusing on Article III considerations. *Bryant* v. *Yellen*, 447 U.S. at 366-368. In *Duke Power*, the Supreme Court did not need to reach the zone of interests test because the plaintiffs were asserting rights protected by the Fifth Amendment. Marquis, *The Zone of Interests Component of the Federal Standing Rules: Alive and Well after All*? 4 U. Ark. at Little Rock L.J. 261, 291-92 (1981). Similarly, in *Eisenstadt* v. *Baird*, the issue was whether a promoter prosecuted for distributing contraceptives had standing to challenge the constitutionality of the statute under which he was convicted by asserting the Fourteenth Amendment equal protection rights of unmarried persons denied access to contraceptives. 405 U.S. at 443. Thus, *Eisenstadt* v. *Baird* was a third-party standing case. Once the Court found that Baird had standing to assert the interests of the third parties, there was no need for discussion of the zone of interests test since there was no question that the asserted right of unmarried persons to obtain contraceptives was arguably within the zone protected by the Equal Protection Clause of the Fourteenth Amendment. *See* 405 U.S. at 447.

> Even when a case falls within these constitutional boundaries, a plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim.

441 U.S. at 99-100. As *Gladstone* demonstrates, the prudential limitations are not always coextensive with the Article III considerations. When a party meets the tests for Article III standing, but asserts an interest not arguably within the zone protected by the relevant statute, *Data Processing* and its progeny mandate denial of standing.

The Petitioners also argue that the general presumption of reviewability in the APA and in the case law precludes the denial of standing to a party based only on the zone of interests test. *See* Pet. at 11-12 n.10. Analysis of the decisions of this Court and of the APA demonstrates the fallacy of this argument.

The Administrative Procedure Act authorizes judicial review of agency action except where "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a) (1976). Contrary to Petitioners' argument, however, the fact that an agency decision is not completely insulated from review under one of these statutory exceptions does not entitle any party to obtain such review, regardless of whether that party meets the established tests for standing.

Significantly, the APA states that only "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action *within the meaning of a relevant statute*, is entitled to judicial review thereof." 5 U.S.C. § 702 (1976) (emphasis added). This is the APA's standing provision, identifying the parties who may obtain the review authorized by Section 701(a). *See Capital Legal Foundation* v. *Commodity Credit Corp.*, 711 F.2d 253, 260 n.17 (D.C. Cir. 1983). Whether a particular party is "aggrieved within the meaning of a relevant statute" is determined pursuant to the established standing rules articulated by this Court, including the zone of interests test. *See Data Processing*, 397 U.S. at 154; *Barlow* v. *Collins*, 397 U.S.

159, 165 (1970); *Investment Company Institute* v. *Camp*, 401 U.S. 617, 620-621 (1971). *See also Sierra Club* v. *Morton*, 405 U.S. 727, 733 (1972); *Capital Legal Foundation* v. *Commodity Credit Corp.*, 711 F.2d at 260 n.17. The APA and the decisions of this Court applying it establish that the general presumption in favor of judicial review does not eliminate the requirement that a particular party have standing to obtain such review.

Implicit in the Petitioners' argument concerning the "insulation" of BATF's decision from judicial review is the proposition that standing cannot be denied where the effect is to preclude review by any party. This contention is not in accordance with the established case law. As this Court has stated, "'[t]he assumption that if respondents have no standing to sue no one would have standing, is not a reason to find standing.'" *Valley Forge*, 454 U.S. at 489 (quoting *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 227 (1974)).

C. The Zone of Interests Test Does Not Require Clarification and Should Not Be Overruled

Petitioners finally assert that this Court should either clarify or overrule the zone of interests test. Pet. at 15. SPI respectfully submits that neither action is appropriate.

Although the lower courts have no discretion as to whether the test should be applied, they have ample discretion regarding how to apply the test. As this Court has recently stated: "Like the prudential component, the constitutional component of standing doctrine incorporates concepts concededly not susceptible of precise definition. . . . These terms cannot be defined so as to make application of the constitutional standing requirement a mechanical exercise." *Allen* v. *Wright*, 468 U.S. _____, 104 S. Ct. 3315, 3325 (1984).[7]

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[7]The District of Columbia Circuit has articulated the discretionary nature of the application of the zone of interests test:

> The 'zone test' is not a 'test' in the sense that it is capable of mechanical application to a set of facts with an easily discernible and certain result. Rather, it is, as this court has

The fact that the zone test allows discretion in its application does not mean that the standard has no limits or that it requires clarification. This Court recently rejected the idea that the discretion inherent in the standing inquiry leaves the lower courts without sufficient guidance: "The absence of precise definitions, however, as this Court's extensive body of case law on standing illustrates, hardly leaves courts at sea in applying the law of standing. Like most legal notions, the standing concepts have gained considerable definition from developing case law." *Allen* v. *Wright*, 468 U.S. at _____, 104 S. Ct. at 3325 (citation omitted).

The zone of interests test "serve[s] to limit the role of the courts in resolving public disputes" to preserve the "proper — and properly limited — role of the courts in a democratic society." *Warth* v. *Seldin*, 422 U.S. at 498, 500. This case is a salient example of the salutary effect of the test. The Petitioners are attempting to invoke limited judicial resources to force an administrative agency to conduct a proceeding in which Petitioners would have nothing of relevance to contribute to the agency's statutorily mandated inquiry. Fortunately, the zone of interests test stands as a barrier to such a wasteful exercise. A test founded on such fundamental principles should not be overruled merely because of its evolving application. *See Allen* v. *Wright*, 468 U.S. at _____, 104 S. Ct. at 3325.

> stated, one of a '*series of inquiries*' designed to determine if a particular party has standing. As an inquiry, the standard involves a great deal of discretion in its application.

Tax Analysts & Advocates v. *Blumenthal*, 566 F.2d 130, 138 n.38 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978) (citations omitted; emphasis in original).

CONCLUSION

The decision of the Court of Appeals for the District of Columbia Circuit correctly applied the zone of interests test, in accordance with the decisions of this Court articulating and interpreting the test, to deny Petitioners standing to challenge BATF's action. This Court has provided adequate guidance to the lower courts for application of the test, which involves the exercise of substantial discretion in accordance with the facts of particular cases, and clarification or overruling of this important prudential consideration is not warranted. Accordingly, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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